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Criminal law -- Counsel -- Withdrawal -- Assistant public defender has demonstrated that, due to excessive caseload, he is unable to properly represent defendant in this case -- Motion to withdraw granted -- Motion to declare section 27.5303(1)(d) unconstitutional on ground that it violates separation of powers by restricting the court's inherent authority to ensure the administration of justice and protection of constitutional rights and on ground that it violates defendant's constitutional rights to effective assistance of counsel and access to courts, is denied -- Although section (1)(d) provides that court shall not approve withdrawal by public defender based solely on inadequacy of funding or excess workload, it is clear that judicial relief is allowed where there is an individualized showing that there is a substantial risk that a defendant's constitutional rights may be prejudiced as a result of the workload

THE STATE OF FLORIDA, Plaintiff, vs. ANTOINE BOWENS, Defendant. Circuit Court, 11th Judicial Circuit, in and for Miami-Dade County. Case No. F09-019364. October 23, 2009. John W. Thornton, Jr., Judge. Counsel: Don Horn, Chet Zerlin, Fleur Lobree, and Penny Brill, for State Attorney. Parker Thomson and Julie Nevins, Hogan and Hartson, and Rory Stein, for Public Defender.

ORDER DENYING PUBLIC DEFENDER'S

MOTION TO DECLARE SECTION 27.5303(1)(d),

FLORIDA STATUTES, UNCONSTITUTIONAL AND

GRANTING PUBLIC DEFENDER'S MOTION

TO WITHDRAW

This matter came before the Court on Public Defender's Motion to Withdraw And To Declare Section 27.5303(1)(d), Florida Statutes, Unconstitutional. The State Attorney's Office opposed the Motion. After several preliminary status conferences, evidentiary hearings were conducted on September 29 and 30, and legal argument was heard on October 1, 2009.

Public Defender for the Eleventh Judicial Circuit (“PD”) asserts that Section 27.5303(1)(d), Florida Statutes (2004), violates the Florida Constitution's separation of powers by restricting the Court's inherent authority to ensure the administration of justice and the protection of constitutional rights, and further violates Defendant's constitutional “rights to effective assistance of counsel and access to courts. Additionally, PD alleges that the excessive caseload of Assistant Public Defender Jay Kolsky (“APD Kolsky”) prevents Kolsky from competently and diligently representing the Defendant herein, Antoine Bowens (“Bowens”), in accordance with the Rules Regulating the Florida Bar. PD argues that the conflict of interest and resulting prejudice to Defendant Bowens is unavoidable and creates a substantial risk that Kolsky's representation of the Defendant will be materially limited by his responsibilities to other clients. For the reasons set forth below, this Court denies PD's Motion to Declare Section 27.5303(1)(d), Florida Statutes, Unconstitutional and grants APD Kolsky's Motion to Withdraw from representing Bowens.

I. Findings of Fact

The Florida Public Defender Association, Inc. has studied the issue of lawyer caseload and determined that the maximum number of felony cases an individual attorney should handle per year is 200. (9/29 Tr. 178). The National Advisory Commission on Criminal Justice Standards and Goals (“NAC”) has stated that the maximum number of felony cases that an attorney should handle per year is 150. (9/29 Tr. 179; 9/30 Tr. 19-20, 33). This standard was recently confirmed through a resolution of the American Council of Chief Defenders (ACCD) in a Statement on Caseloads and Workloads dated August 24, 2007, although that resolution suggests that the NAC standard may be on the high side. (9/30 Tr. 33-34; Ex. O).

As of mid-July 2009, APD Kolsky had 164 pending “C” (mostly third degree) felony cases. (9/29 Tr. 157). Kolsky's

caseload was reduced to 105 pending cases as of August 28, 2009. (9/29 Tr. 92-93, 182-83). By the end of September, it was back up to 125 pending cases. Kolsky's caseload turns over approximately five or six times a year. (9/29 Tr. 245). Assuming that the lowest caseload of 105 cases holds constant throughout the year, Kolsky will have handled at least 525 to 630 felony cases at the end of this fiscal year, not including pleas at arraignment. (9/29 Tr. 137). The stipulation of the parties shows that in FY 2008-09, Kolsky handled a total of 736 felony cases, in addition to 235 pleas at arraignment. (Stipulation). Meanwhile, Kolsky continues to receive additional cases. In addition to his caseload, Kolsky has training and other responsibilities at PD-11, increasing his overall workload. (9/29 Tr. 44, 49, 52).

State and national caseload standards and actual caseload figures are not, alone, determinative of whether an excessive caseload exists. *State v, Public Defender, Eleventh Judicial Circuit,* 12 So. 3d 798, 801 (Fla. 3d DCA 2009). However, they do serve as factors to consider in evaluating the genuineness and sufficiency of Kolsky's testimony that he can not effectively handle, even with his 36 years of experience in the criminal justice system as both a prosecutor and defense attorney, Defendant Bowens' case. (9/29 Tr. 18).

The evidentiary hearing has shown that the number of cases assigned to Kolsky has had a detrimental effect on his ability to competently and diligently represent and communicate with all his clients on an individual basis. This detrimental effect begins at arraignment where Kolsky holds very brief conversations with clients he is meeting for the first time. (9/29 Tr. 20-22, 65; Ex. A ¶ 6). Usually, these conversations are not confidential because of the presence of other persons within earshot. (9/29 Tr. 21, 64; 9/30 Tr. 95, 115-16; 159-60; Ex. A ¶ 8). As a result, these conversations generally do not include a discussion of the facts of the case, possible defense witnesses, and preservation of evidence (9/29 Tr. 129), making it very difficult to provide meaningful assistance or begin establishing the trust necessary for an attorney-client relationship. (9/29 Tr. 20-25; Ex. A ¶¶ 6-8). The detrimental effect extends to Kolsky's competence, diligence and communication after arraignment. Kolsky's opportunity to meet with out-of-custody clients is extremely limited, due in part to the office priority understandably given to in-custody defendants. (9/29 Tr. 34). Even then, Kolsky cannot schedule meetings with in-custody defendants until approximately two months after arraignment, and those sessions only last a maximum of thirty minutes each. Based upon the sheer number of clients he represents, Kolsky has eight to ten depositions set every day during his non-trial weeks (two out of every three weeks). Kolsky did not have time to meet with Bowens, who is not in custody, after arraignment, nor has he communicated with him regarding the discovery the State provided. (9/29 Tr. 132-34).

The status and progress of Bowens' case is a symptom of Kolsky's excessive caseload. Bowens is charged with sale of cocaine within 1000 feet of a school. (9/29 Tr. 39). The state has filed a notice of enhancement as a habitual felony offender and Bowens therefore faces a possible sentence of life imprisonment. (*Id.*) The unrebutted testimony is that Kolsky has been able to do virtually nothing on this case. (9/29 Tr. 40). Kolsky has not had time to meet with his client other than for a very brief, non-confidential discussion when Bowens was first arraigned. (9/29 Tr. 21, 40-41, 64, 118). Kolsky has not obtained a list of defense witnesses from Bowens. Kolsky has not had time to take depositions. Kolsky has not visited the scene of the alleged crime. (9/29 Tr. 40-43). He has not determined the existence of, nor interviewed, any potential defense witnesses. He has not consulted with any experts. He has not prepared a mitigation package. He has not filed any defense motions, including a motion to disclose the confidential informant (who, according to the arrest affidavit, allegedly bought the cocaine from Bowens outside the presence of the police officers). (*Id.*)

On October 22, 2009 the case was set for Calendar Call and both the State and Defendant announced they were not ready for trial. This Court granted the request for continuance, thus waiving speedy trial, and the matter has been removed from the trial docket for November 2, 2009 and reset for trial on January 19, 2010.

The two Assistant State Attorneys who testified as witnesses during the evidentiary hearing opined that Kolsky was generally well-prepared, possessed integrity and was knowledgeable about his clients and their cases. Both candidly admitted that they did not know what Kolsky had not done on his cases, as neither had been defense attorneys. (9/30 Tr. 128, 130, 150-51).

The State also raised the issue of management of PD-11's resources. This Court finds Public Defender Carlos Martinez's testimony as to choices he has made to be credible and further finds that he is managing PD-11 amid a most challenging and difficult fiscal environment.

II. Constitutionality

The statute at issue in PD's Motion is found in Section 27.5303, Florida Statutes, entitled "Public defenders; criminal conflict and civil regional counsel; conflict of interest." The challenged subsection provides:

> (1)(d) In no case shall the court approve a withdrawal by the public defender or criminal conflict and civil regional counsel based solely on the inadequacy of funding or excess workload of the public defender.

This subsection must be read *in pari materia* with the following subsections of Section 27.5303:

> (1)(a) If, at any time during the representation of two or more defendants, a public defender determines that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender's office or his or her staff because of a conflict of interest, then the public defender shall file a motion to withdraw and move the court to appoint other counsel. The court shall review and may inquire into the adequacy of the public defender's representations regarding conflict of interest without requiring disclosure of any confidential communications. The court shall deny the motion to withdraw if the court finds that the grounds are insufficient or the asserted conflict is not prejudicial to the indigent client.
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> (1)(e) In determining whether or not there is a conflict of interest, the public defender or regional counsel shall apply the standards contained in the Uniform Standards for use in Conflict of Interest cases found in appendix C to the Final Report of Art. V Indigent Services Advisory Board dated January 6, 2004.

Additionally, this Court must consider *State v. Public Defender,* 12 So. 3d 798 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D963b], which recently interpreted Section 27.5303 in the context of an earlier challenge by PD-11, which was based on PD's assertion that excessive caseload on the office as a whole could provide the basis for mass withdrawal from future cases. The court held that PD was required to prove prejudice or conflict, separate from excessive caseload, and must prove such prejudice or conflict on an individual basis, to be relieved of the duty to represent an indigent client. *Id.* at 806.

In analyzing the relevant statutory provisions and the import of *State v. Public Defender,* this Court is mindful that statutes "come clothed with a presumption of constitutionality and must be construed, whenever possible, to effect a constitutional outcome." *Crist v. Florida Assn. of Criminal Defense Lawyers,* 978 So. 2d 134, 139 (Fla. 2008). Further, it is a "settled principle of constitutional law that courts should not pass on the constitutionality of statutes if the case in which the question arises may be effectively disposed of on other grounds." *Singletary v. State,* 322 So. 2d 551, 552 (Fla. 1975).

As argued by PD, the *State v. Pubic Defender* decision effectively prohibits withdrawal when based solely upon excessive caseload. PD asserts, however, that the decision was premised only on an analysis of traditional conflicts, which are reviewed on a case-by-case basis, and necessarily do not consider the effects of excessive caseload. Therefore, PD posits that the statute violates the court's inherent authority to provide a remedy for a public defender's excessive caseload, the consequences of which violate both separation of powers as well as defendant's constitutional rights to access to the courts and effective assistance of counsel, which, it is argued, includes the requirement that his counsel not have a conflict of loyalty to his various clients based on the overload.

In response, the State contends that the use of the word "solely" in the statute's plain language preserves a court's inherent authority to carry out its duties. According to the State, neither the statutory framework nor the *State v. Public Defender* decision forecloses judicial relief upon demonstration of actual prejudice to a defendant's constitutional rights.

In determining the effect and purpose of a statute, the courts must examine the actual words used in the statute to determine the plain meaning of the word. *Calabro v. State,* 995So. 2d 307, 314 (Fla. 2008). The use of the word "solely" in Section 27.5303(1)(d) is not a prohibition on consideration of excessive caseload as a factor in an

attorney's motion to withdraw; rather the statute intends that other considerations be present. Although the Third District determined that the conflict of interest contemplated by Section 27.5303 included only the traditional conflicts arising from the representation of codefendants and certain witnesses or parties, the court also held, "That is not to say that an individual attorney cannot move for withdrawal when a client is, or will be, prejudiced or harmed by the attorney's ineffective representation. However, such a determination, absent individualized proof of prejudice or conflict, other than excessive caseload, is defeated by the plain language of the statute." *Public Defender,* 12 So. 3d at 805. When examining the plain language of the statute, as interpreted by the Third District in *State v. Public Defender,* there exists a cognizable difference between a withdrawal based solely on workload, and a withdrawal where an individualized showing is made that there is a substantial risk that a defendant's constitutional rights may be prejudiced as a result of the workload. This distinction allows for judicial relief where prejudice to constitutional rights is adequately demonstrated. Thus subsection (d) is not constitutionally infirm.

III. Motion to Withdraw

Based on the above analysis, it is clear that Section 27.5303 authorizes the trial court to permit a public defender to withdraw in situations where individualized proof of prejudice, including prejudice based on excessive caseload, has been demonstrated to the court's satisfaction. The question then becomes whether there has been a showing of prejudice.

The Rules Regulating the Florida Bar, specifically Rule 4-1.7(a)(2), prohibit representation by a lawyer when there is a substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client. PD contends that case law supports the proposition that prejudice is sufficiently demonstrated by the possibility of future harm based upon the demands on an assistant public defender's time. *See Scott v. State,* 991 So. 2d 971 (Fla. 1st DCA 2008); *See also Lucky v. Harris,* 860 F.2d 1012, 1017 (11th Cir. 1988), *subsequently dismissed on abstention grounds,* 976 F.2d 673 (11th Cir. 1992) ("([p]rospective relief is designed to avoid future harm. . . . [T]he plaintiffs burden is to show the 'likelihood of substantial and immediate irreparable injury, and inadequacy of remedies at law.' ") In contrast, the State argues that there must be proof of current actual prejudice to the defendant's constitutional rights before withdrawal is allowed.

The Third District's ruling in *State v. Public Defender* provides clear guidance as to the framework for analysis. As noted by the court, "That is not to say that an individual attorney cannot move for withdrawal when a client is, or will be, prejudiced or harmed by the attorney's ineffective representation." *Public Defender,* 12 So. 3d at 805. The use of the disjunctive phrase "or will be" clearly indicates that a trial court may properly consider possible future harm. Further, Rule 4.1-7(a)(2) prohibits representation if there is a substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client. The phrase "substantial risk" is also forward-looking.

Based on the foregoing, this Court finds that if an assistant public defender requests permission to withdraw from representation of a client based on considerations of excessive caseload, there must be an individualized showing of a substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client. In the instant case, the evidence and testimony presented demonstrates the requisite prejudice to Defendant Bowens as a result of Kolsky's to-date ineffective representation. The uncontroverted evidence and testimony of Kolsky shows that he has been able to do virtually nothing in preparation of Bowens' defense. Kolsky has not obtained a list of defense witnesses from Defendant Bowens, nor has he taken depositions. He has not visited the scene of the alleged crime, looked for defense witnesses, or interviewed them. He has not prepared a mitigation package nor has he filed any motions. Additionally, Kolsky had to request a continuance of the trial date at the calendar call of Defendant Bowens held on October 22, 2009, which resulted in a waiver of the defendant's right to a speedy trial. Based on the evidence presented, this Court finds that Kolsky has met his burden of demonstrating adequate, individualized proof of prejudice to Defendant Bowens as a result of his ineffective representation.

Finally, APD Kolsky, Eleventh Judicial Circuit Public Defender Carlos Martinez and other experts presented ample credible testimony and evidence to support the conclusion that the prejudice to Defendant Bowens is a direct result of Kolsky's workload. The prejudice is not the result of any intentional effort to avoid representation of Bowens. Nor is the prejudice a result of his lack of legal knowledge or legal skills. Indeed, APD Kolsky is one of the best and most experienced lawyers in PD-11's office. Although the State raised the issue of whether any prejudice caused by

Kolsky's excessive caseload resulting from his office's management of resources, it is clear that this Court should not, and will not, involve itself in the management of the public defender's office. *Skitka v. State,* 579 So.2d 102, 104 (Fla. 1991), It is respectfully recommended, however, that the legislature adequately fund both Public Defender and State Attorney Offices in order to guarantee our citizens these important constitutional rights.

Therefore, this Court's determination is whether Defendant Bowens' constitutional rights, as a result of Kolsky's demonstrated inability to properly represent him in this case, are being prejudiced. This Court finds that Bowens is so prejudiced.

Based on the findings and rulings set forth above, it is hereby ORDERED and ADJUDGED that PD's Motion to Declare Section 27.5303(1)(d), Florida Statutes, Unconstitutional is DENIED and APD Kolsky's Motion to Withdraw is GRANTED.

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